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DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Consolidated Arbitrations	D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94
Performance Assurance Plan	D.T.E. 03-50

**AT&T's FURTHER COMMENTS ON CONSIDERED ELIMINATION OF
CONSOLIDATED ARBITRATIONS PERFORMANCE STANDARDS**

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Introduction

By memorandum dated December 8, 2004, the Department of Telecommunications and Energy (the “Department”) asked parties to D.P.U./D.T.E. 96-73/74, 96-75, 98-80/81, 96-83, 96-94 (“*Consolidated Arbitrations*”), and other interested parties, to provide further comment on its proposal to eliminate the performance standards to which Verizon Massachusetts (“Verizon”) is bound under its interconnection agreements (“ICAs”) with CLECs. AT&T and Verizon previously filed comments on February 12, 2004. Along with MCI, they filed reply comments on March 4, 2004. AT&T Communications of New England, Inc. (“AT&T”)¹ respectfully submits these further comments in response to the Department’s request and reasserts its opposition to the Department’s proposal.

In its December 8, 2004, the Department asked the parties to address three different questions. AT&T’s responses are set forth below.

I. *Is the Department precluded from eliminating the Consolidated Arbitrations performance standards from interconnection agreements by a decision in this docket, or is the Department required to conduct an arbitration or engage in some other procedure for purposes of determining whether to eliminate the Consolidated Arbitrations performance standards from interconnection agreements?*

A. **THE DEPARTMENT CANNOT ISSUE AN ORDER IN THIS DOCKET THAT BY OPERATION OF LAW RELIEVES VERIZON OF AN OBLIGATION UNDER ITS INTERCONNECTION AGREEMENTS WITH CLECS AND CONCOMITANTLY ELIMINATES CLEC RIGHTS UNDER THEIR INTERCONNECTION AGREEMENTS.**

The Department cannot simply abrogate a Verizon obligation and eliminate CLEC rights under existing interconnection agreements without violating the

¹ AT&T files these comments on behalf of itself and all of its operating entities in Massachusetts.

Telecommunications Act of 1996 and without the balancing of interests and impacts required by the U.S. Constitution's prohibition against impairment of contracts.

1. The Department's Proposal to "Change The Law" Applicable To All Interconnection Agreements Is An Unlawful End-Run Around The Contract Protection Recognized in *Pacific Bell v. Pac-West Telecom, Inc.*

It is hard to understand how the Department can issue a general order that eliminates Verizon's performance obligations under all ICAs that impose such obligations without violating the clear principle in *Pacific Bell* that contract rights are to be respected. Indeed, the Department's proposal to unilaterally and on its own motion disturb the parties' contractual relationship is perhaps even more problematic than the California Commission's attempt in *Pacific Bell* to "interpret" the meaning of reciprocal compensation obligations in existing interconnection agreements in a rulemaking proceeding. In any event, the Department's proposal would on its face violate the clear language in *Pacific Bell*:

By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or at the very least it acted arbitrarily and capriciously in purporting to interpret "standard" interconnections agreements.

Pacific Bell v. Pac-West Telecom, Inc., 325 F.3d 1114, 1125-1126 (9th Cir. 2003).

Indeed, Verizon itself has argued to the Department that the Department cannot require it to offer on the basis of generic terms and conditions any services or elements. Although Verizon was referring to tariffs in that case, it was complaining about the Department's interference with its right to negotiate interconnection agreements under the

Telecommunications Act by imposing generic terms and conditions.² If consistency were the criterion for Verizon's position, one would expect it to oppose the Department's proposal in the instant case.

The change of law provisions in the interconnection agreements were intended to address changes in generally applicable law, *i.e.*, rules of general application. They were not intended to permit state commissions to reopen and reconsider a decision they have already made so as to exercise their discretion to relieve a party of its contractual obligations. Indeed, under AT&T's interconnection agreement with Verizon, it is the parties that have an obligation in the first instance to negotiate changes to their interconnection agreements. Only if they are unable to reach agreement, is it open for one or both of the parties to seek Department review. Such provisions place the burden where it should be: on the parties to the interconnection agreement.

The Department's proposal takes away from the parties the responsibility to negotiate their own changes to their interconnection agreements. Indeed, it would do precisely what Verizon complained of, when it quoted language from *Wisconsin Bell v. Worldcom, Inc.*, 330 F.3d 441, 444 (7th Cir. 2003): it would "interfere with the procedures established by the federal act [by] plac[ing] a thumb on the negotiating scales" to the benefit of one party.³ The instant case is a clear example. If Verizon believes that maintaining the ICA metrics is too burdensome, it has an incentive to negotiate an alternative, but only so long the CLECs have their contract right to such

² See, Reply Comments of Verizon Massachusetts, at 33, filed on August 17, 2004, in D.T.E. 03-60. See also, Verizon Massachusetts Reply To Briefing Questions, at 28, filed on July 30, 2004, in D.T.E. 03-60.

³ See, Verizon Massachusetts Reply To Briefing Questions, at 28, filed on July 30, 2004, in D.T.E. 03-60.

metrics. One could easily imagine a negotiated resolution to the problem of burdensomeness, where AT&T agrees to give up its right to ICA metrics and penalties in return for such other benefits as improved performance standards or increased penalty payments under a single set of PAP metrics. Alternatively, AT&T may accept some other benefit. Moreover, this process would keep Verizon honest; that is, it would ensure that the burden that Verizon allegedly⁴ shoulders from maintaining two sets of metrics is real and large enough to pay for.

The Department's proposal would create a perverse incentive. It incents parties in the first instance, and prior to any negotiation, to request that the Department change "the law" with respect to a provision in the interconnection agreement that the party finds troublesome. Once "the law" relating to this single issue in specific interconnection agreements has changed, the benefiting party has no incentive to negotiate.

In the instant case, the benefiting party would, of course, be Verizon. It is a true beyond dispute that Verizon, as the monopoly owner of bottleneck facilities, has all the leverage in the absence of state or federal regulation, or interconnection agreements that arose from such regulation. CLEC property interests in their contract rights are the only leverage CLECs have. If the Department unilaterally eliminates those rights, it would be putting, not just its thumbs, but its entire weight on the scales in favor of Verizon.

⁴ As we discuss below, there is no evidence of any such burden. Indeed, Verizon has not even attempted to put any such evidence forward. In an unusual procedural development, the allegation of putative burden to all parties (even to CLECs) appears in a Department notice. Dec. 8 Memorandum, at 3.

2. The Department May Not Impair Existing Contract Obligations On The Basis Of An Untested, Unsupported Allegation of Burdensomeness and In The Absence of Consideration of the Public Interest.

In the absence of a request or complaint from any party, the Department, in a January 22, 2004 Memorandum, announced a proposal to eliminate existing contract rights of CLECs. The Department offered little reason beyond an assumption that the process for developing the PAP performance standards should produce better standards and metrics than those reflected in the CLECs' ICAs and an unsupported assertion that "administering two performance standards plans may be an unnecessary burden on Department Staff, the CLEC community, as well as Verizon." January 22, 2004 Memorandum, at 3.

If the Department were to implement its proposal, it would be exercising raw state power to eliminate *existing* contract rights of CLECs. It goes without saying that such action would constitute an "impairment of contract." Although the courts have found that in appropriate circumstances, states may impair contract obligations, the circumstances must in fact be appropriate in order to be constitutionally permissible. For example, in *Moser v. Aminoil, U.S.A., Inc.*, 618 F.Supp. 774, 780 (D.C. La. 1985), the court held that state regulations may impair existing contractual obligations "if (1) the state has a significant and legitimate public purpose behind the regulation, and, (2) the impairment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the statute's adoption." None of the reasons the Department has provided so far demonstrates a "significant and legitimate public purpose" especially when balanced against the fact that

impairment is adverse to the most vulnerable of the contracting parties and contrary to the the public's interest in promoting competition.

II. *If the Department has authority to eliminate the Consolidated Arbitrations performance standards from interconnection agreements by a decision in this docket, must the Department conduct an adjudicatory hearing, as AT&T contends in its initial and reply comments? . . . If so, what would be the factual issues in dispute and type of evidence to be examined?*

A. **UNDER THE ADMINISTRATIVE PROCEDURES ACT, THE DEPARTMENT MUST PROVIDE A HEARING AND AN OPPORTUNITY TO BE HEARD BEFORE IT MAY TAKE CLEC PROPERTY.**

The Massachusetts State Administrative Procedure Act (sometimes “APA”) defines an “adjudicatory proceeding” as “a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing.” G.L. c. 30A §1(1). The generally accepted standard is that an agency engages in quasi-judicial activity when it adjudicates the rights and interests of particular persons based on specific facts. *See* 38 Mass. Prac. Administrative Law & Practice § 371. Under the Administrative Procedures Act, when the rights of specific named parties are being determined, such parties have a right to a hearing and “to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence.” G.L. c. 30A, § 11(3).

Clearly, if the Department were to eliminate the contract rights of the CLECs that are parties to the interconnection agreements that resulted from the *Consolidated Arbitrations*, the Department would be affecting “the legal rights, duties or privileges of specifically named persons.” As a result, under Chapter 30A, each CLEC would have a right to a hearing and all the other protections of due process. Accordingly, the Department cannot make a decision to eliminate the contract right of CLECs without first

holding a hearing at which new facts are presented, and at which the parties have the opportunity to present evidence and cross-examine witnesses.

In its March 4, 2004 reply comments filed in this docket, Verizon sought to rebut AT&T's argument that the Department must afford due process protections to CLECs before it eliminates their rights under interconnection agreements. In an argument that elevates form over substance, Verizon tried to distinguish arbitration proceedings from adjudicatory proceedings, and concluded by asserting that, because no adjudicatory processes were required in the arbitration proceedings, none should be required now.⁵ Verizon points to no authority in support for its claim that adjudicatory processes were not "required." At a minimum, findings of fact in an arbitration, *e.g.*, related to costs, that do not rely on evidence would likely be arbitrary and capricious. The Department is not free to make up facts out of whole cloth. A decision that eliminates the rights of CLECs should not be based on supposed facts as to which there has been no investigation and no vetting.

Verizon also seeks to avoid the due process requirements of the APA by asserting that the CLEC rights at issue are not "required by constitutional right or by any provision of the General Law[.]"⁶ Verizon, however, ignores the fact that the CLEC rights to adequate performance from Verizon, and payments for inadequate performance, are property rights protected by the federal and state constitutions. M.G.L.A. Const. Pt. 1, Art. 1, 10, 12; U.S.C.A. Const. Amend. 14. The Department may not take away CLEC property without affording CLECs due process protections.

⁵ Reply Comments of Verizon Massachusetts, at 5, filed March 4, 2004, in this docket.

⁶ *Id.*, at 5, quoting G.L. c. 30A, § 1(1).

B. THE DEPARTMENT CANNOT REVERSE ITS PRIOR DECISIONS WITHOUT RECORD EVIDENCE THAT HAS BEEN TESTED IN CROSS EXAMINATION SHOWING THAT FACTUAL CIRCUMSTANCES ARE DIFFERENT FROM WHAT THEY WERE WHEN THE DEPARTMENT REITERATED ITS REQUIREMENT THAT VERIZON HONOR ITS ICA PERFORMANCE PAYMENTS TO THE EXTENT THEY EXCEED PAYMENTS UNDER THE PAP.

In its February 12, 2004 comments in this docket, AT&T recounted the numerous Department decisions in the *Consolidated Arbitrations* in which the Department reviewed the evidence and established the performance metrics and penalties for inclusion in the interconnection agreements. *Consolidated Arbitrations*, Phase 3 Order (December 4, 1996), at 25-26. *See Consolidated Arbitrations* Phase 3 Order at 21-27; Phase 3-B Order at 22; Phase 3-E Order at 2, n.4. AT&T also noted the Department's reaffirmation, in D.T.E. 99-271, of its findings and ruling in the *Consolidated Arbitrations* about the necessity of liquidated damages, and its adoption in D.T.E. 99-271 of a performance plan that does not supplant CLEC rights to performance metrics and penalties under the ICAs. In its initial order in D.T.E. 99-271, the Department ensured that CLECs continued to enjoy the protections of the liquidated damages provisions in their contracts by finding that CLECs should recover the higher of the remedies between the PAP and the ICA performance standards when Verizon failed to perform satisfactorily. *See* D.T.E. 99-271 (September 5, 2000), at 30. Then, in an order on AT&T's motion for reconsideration in D.T.E. 99-271, the Department *again* reaffirmed its position that CLECs should receive the amounts due them under their ICAs, by reiterating its finding that CLECs should receive the higher of the penalties due under the PAP and under the *Consolidation Arbitration* metrics. D.T.E. 99-271 (November 21, 2000), at 13. The Department stated, "This provision is fair to both VZ-MA and CLECs." *Id.*

AT&T also set out the requirements for reasoned consistency in Department decision making.⁷ Those requirements make clear that the Department cannot now, without a reasoned basis suddenly reverse its prior decision that allowing CLECs to receive the higher of the PAP and the ICA penalties is necessary to provide adequate disincentives for Verizon to engage in antidiscriminatory conduct.

In its December 8, 2004, Memorandum, the Department summarized the reasons for its proposal. Those reasons boil down to an untested claim that the process for developing the PAP performance standards should produce better standards and metrics than those reflected in the CLECs' ICAs. December 8 Memorandum, at 3. In its January 22, 2004 Memorandum, at 3, the Department also stated that “[a]t this point in time, administering two performance standards plans may be an unnecessary burden on Department Staff, the CLEC community, as well as Verizon.”

Given that the nature of the PAP and the ICA performance standards were well known at the time the Department determined that the two sets of standards operating in tandem best advanced the public interest, the only new reason offered by the Department is “burden.” Yet, neither the Department nor Verizon has provided any information regarding the nature or extent of that burden. Although the Department’s notice indicated that administration of two performance plans may be a burden on the CLEC Community, AT&T has not experienced any such burden, at least not a burden that would warrant foregoing its contract rights. (Indeed, if there were such a burden, there is nothing that prevents AT&T from voluntarily relinquishing such contract rights.) If Verizon experiences this as a burden, then it should (1) say so, and (2) present evidence of the

⁷ See, AT&T’s Initial Comments On Considered Elimination Of Consolidated Arbitrations Performance Standards, at 3-5, filed February 12, 2004, in this docket.

nature and extent of that burden. It should present evidence regarding what types of activities would be eliminated and what types of costs would be saved by the adoption of the Department's proposal.

In summary, if "burden" is a reason for eliminating CLEC property interests in their contract rights, there should be some evidence regarding the nature and extent of that burden.

C. BEFORE THE DEPARTMENT CAN REVERSE ITS PRIOR DECISIONS, THERE MUST BE RECORD EVIDENCE THAT THE ALLEGED BASIS OF BURDENSOMENESS EXISTS AND OUTWEIGHS THE ANTICOMPETITIVE IMPACT OF ELIMINATING PERFORMANCE INCENTIVES BUILT INTO THE INTERCONNECTION AGREEMENTS.

If the Department determines that there is, in fact, a burden that is borne by the industry to maintain two sets of performance plans, then it must determine whether it is an "unnecessary" burden. That is, it must determine whether the cost of maintaining the two arrangements justifies the elimination of the disincentives against Verizon antidiscriminatory conduct. Furthermore, it must determine whether there are other means for eliminating the burden (assuming the Department finds after investigation that the burden is sufficient to warrant addressing) without taking CLEC property interests. For example, the Department should investigate whether it is possible to convert the existing ICA metrics to the PAP metrics in a manner that produces a level of penalty payments comparable to the level produced under the current arrangement. In that way, the putative burden could be eliminated without eliminating the CLEC property interests in their contract rights.

Indeed, the Department should investigate in what areas of performance Verizon is currently making the most penalty payments and determining whether such payments are having the desired effect on Verizon's behavior. AT&T has found that the source of

its penalty payments (ICA performance metrics vs. PAP) varies wildly over time. In fact, it appears that ***the ICA metrics provided the payments due to AT&T much more frequently than did the PAP over the last year.*** Before the Department simply eliminates the ICA performance metrics, it should determine how often, and for how many carriers, the ICA metrics are the source of payments for CLECs, and for which types of Verizon performance. It may well be that such payments provide a marginal level of protection in certain critical areas that are extremely important, if not essential, to ensuring competitive parity. It would be arbitrary and irrational to eliminate performance metrics without even knowing which types of behavior such metrics are affecting and the extent of their influence.

III. *Procedurally, how would Verizon and CLECs implement a Department Decision in this docket eliminating the Consolidated Arbitrations performance standards from their interconnection agreements? Would such a Department decision constitute a change of law requiring revision of these interconnection agreements pursuant to the agreements' change-of-law provisions? Please explain.*

As AT&T stated above, a Department decision that generically eliminates CLEC rights based on an exercise of discretion is not lawful. If, however, the Department proceeds with its proposal, then the only way to implement the putative “change of law” would be through the “change of law” provisions in the ICAs. This will allow for at least some type of negotiation to take place. It would also be consistent with the Department Staff’s resolution of a complaint for expedited dispute resolution that AT&T had filed seeking enforcement of its rights under Verizon’s tariff. Department staff found

enforcement of the tariff inappropriate because the issues were raised for contract negotiation in D.T.E. 04-33.⁸

It is AT&T's position that, if the Department's decision in this docket constitutes a "change of law" for purposes of reopening its interconnection agreements with Verizon, then implementation of the Department's order necessarily opens up substitute arrangements and protections necessary for AT&T to continue to do business in Massachusetts. For example, under the 1998 interconnection agreement between AT&T and Verizon, upon a triggering "change of law" event, "the Parties shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action." (p. 12, Section 7.3). Acceptable new terms for AT&T must include some type of protection or compensation for the lost rights. Only in this way can there be a meaningful "negotiation." In the absence of meaningful negotiation, the Department's order in this docket eliminating ICA metrics, even if implemented through ICAs pursuant to "change of law" provisions, would be a generic order revising the commercial arrangements between carriers, and as such would be unlawful under *Pacific Bell*.

Conclusion

For the reasons stated above, the Department cannot lawfully eliminate on a generic basis CLEC property interests in their interconnection agreements. If, nevertheless, the Department were to proceed with its proposal, it would need to make an informed decision on the basis of the facts and factors set forth above.

⁸ See, Letter from Michael Isenberg to Jay Gruber and Keefe Clemons, dated June 7, 2004, constituting the Telecommunications Division's decision on AT&T's Request for Expedited Review of Petition to Enforce Verizon Tariff No. 17.

Respectfully submitted,

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